STATE OF MICHIGAN

COURT OF APPEALS

R.J. INN, INC., d/b/a/ KENSINGTON INN OF HOWELL, C.J. INN, INC., d/b/a QUALITY INN OF HOWELL and JAPPAYA DEVELOPMENT, LLC, Plaintiffs-Appellees,	UNPUBLISHED March 6, 2007
v	No. 271852 Livingston Circuit Court
CITY OF HOWELL, Defendant-Appellant.	LC No. 05-21417-CZ

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant appeals the trial court's denial of its motion for summary disposition of count I of plaintiffs' complaint. We reverse and remand for further proceedings consistent with this opinion.

Defendant operates a municipal wastewater treatment plant. In 1999-2000, that plant was expanded and improved to allow defendant to accept waste from neighboring Marion Township. Plaintiffs allege that increased odors emanating from the expanded plant negatively impacted their business, causing one of their two nearby hotels to close and the other to experience significant financial losses. In count I of their complaint, plaintiffs allege that defendant's expanded operation of the wastewater treatment plant constitutes a "trespass and/or trespass/nuisance and/or nuisance per se." The trial court denied defendant's motion for summary disposition of this count under MCR 2.116(C)(7), on grounds of governmental immunity. Defendant now appeals the trial court's decision in this regard.[1]

[1] Defendant also moved for summary disposition of plaintiffs' complaint pursuant to MCR 2.116(C)(10). Plaintiffs essentially consented to dismissal of count III of the complaint, and the trial court granted summary disposition as to that count, but denied defendant's motion as to the remainder of the complaint. The only issue raised on appeal is whether the trial court erred in denying defendant's motion for summary disposition of count I pursuant to MCR 2.116(C)(7).

We review both the trial court's denial of summary disposition pursuant to MCR 2.116(C)(7) and the applicability of governmental immunity, which is a question of law, de novo. *Davis v City of Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2005); *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Under MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *Davis, supra*. There is no dispute that as a "municipal corporation," defendant is a "governmental agency." MCL 691.1401(b) and (d). Our Supreme Court has explained that a "governmental function" is "an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law." *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 620; 363 NW2d 341 (1984). Plaintiffs contend that they were harmed by defendant's operation of the wastewater treatment plant. Defendant's authority for operating that plant is derived from the Michigan Constitution, state law, and defendant's City Charter. Const 1963, art 7, § 24; MCL 117.4f; MCL 141.104; Howell City Charter, Section 3.2(5)(b). Operation of a wastewater treatment plant under such authority constitutes a governmental function. See *Murphy v Muskegon Co*, 162 Mich App 609, 621; 413 NW2d 73 (1987) ("the operation of the wastewater system by defendants constituted a governmental function since this activity was expressly authorized by 1957 PA 185, MCL 123.731 *et seq.*"). Indeed, plaintiffs do not assert otherwise.

As the Court explained in *Ross, supra*, "When a governmental agency engages in mandated or authorized activities, it is immune from tort liability, unless the activity is proprietary in nature (as defined in § 13 [MCL 691.1413]) or falls within one of the other statutory exceptions to the governmental immunity act." Thus, defendant is immune from tort liability arising from its operation of the plant unless an exception to governmental immunity applies to that operation. *Murphy, supra*; *Davis, supra* at 379. Plaintiffs assert, and the trial court found, that the "proprietary function" exception applies to the instant case. We disagree.

The proprietary function exception to governmental immunity provides in pertinent part:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted *primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees*. [MCL 691.1413 (emphasis added).]

Thus, for a governmental activity to constitute a proprietary function, "[t]wo tests must be satisfied: [t]he activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998); citing *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 257-258; 393 NW2d 847 (1986). When determining whether an agency's primary purpose in engaging in an activity is to produce a pecuniary profit, a court considers whether a profit is actually generated and, if so, where it is deposited and how it is spent. *Id.* If profit from an activity is deposited in an agency's general fund or is used to finance functions unrelated to that activity, such could indicate that the activity was intended to be "a general revenue-raising device" undertaken primarily for profit. *Hyde, supra* at 259. If, however, revenue from an

activity is used to pay current and long-range expenses involved in conducting that activity, such could indicate that the primary purpose of the activity was not to produce a pecuniary profit. *Id.* The proprietary function exception "permits imposition of tort liability only where the *primary* purpose is to produce a pecuniary profit. It does not penalize a governmental agency's legitimate desire to conduct an activity on a self-sustaining basis." *Id.* at 258-259. See also *Adam v Sylvan Glynn Golf Course,* 197 Mich App 95, 98; 494 NW2d 791 (1992) ("[a]n agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exemption.").

Applying these principles to the instant case, we conclude that defendant's wastewater treatment plant is not a proprietary function. There is no indication that any fees or charges collected for wastewater treatment are placed in defendant's general fund or are used to fund activities other than operation of the plant. Defendant's charter provides that rates charged to users of defendant's sewer system shall be such as are necessary for operation and maintenance of that system.[2] Similarly, defendant's contract with Marion Township requires that fees collected from Marion Township users be placed in a separate account distinct from defendant's other accounts, with any surplus and interest amounts to remain in that separate account. These user charges may only be used for the operation and maintenance of the wastewater treatment plant and, by contract, cannot be used to fund other activities undertaken by defendant. Revenue from operation of the plant is used to pay current and long-range expenses involved in operating the plant; it is not used to fund unrelated activities. Therefore, defendant does not operate its wastewater treatment plant primarily for pecuniary gain. *Coleman, supra* at 621; *Hyde, supra* at 257-259. That the plant may be self-sustaining such that defendant does not have to operate or maintain the plant from its general fund does not require us to conclude otherwise. *Hyde, supra* at 258-259; *Adam, supra* at 98.

Plaintiffs argue that because the plant was expanded to allow defendant to accept waste from Marion Township in exchange for fees and capital investment, and because the plant expansion was unnecessary to allow defendant to service its own residents, defendant's expanded operation of the plant became a proprietary function. Plaintiffs note that before expansion, the plant had excess capacity for defendant's own residents, but faced a $3 million

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[2] Section 1044.11(b) of defendant's charter provides:

> The rates [for water and sewage service] . . . are estimated to be sufficient to provide for the payment of any indebtedness, to provide for the expenses of administration and operation, to provide for the expenses of maintenance of such system as necessary to preserve the same in good repair and working order, and to build up a reasonable reserve for equipment replacement. Such rates shall be fixed and revised from time to time as may be necessary to produce these amounts. An annual audit shall be prepared. Based on such audit, rates for water and sewage service shall be reviewed annually and revised as necessary to meet system expenses ad to ensure that all users pay their proportionate share of operation, maintenance and equipment replacement costs.

upgrade.[3] As a result of the expansion, defendant's residents avoided paying for that upgrade, realizing a potential $3 million savings. Additionally, defendant's residents now share the operational costs of the plant with Marion Township users. Thus, according to plaintiffs, defendant's residents obtained "substantial financial benefit" from expansion of the plant to accommodate Marian Township, which converted the purpose of the plant's expanded operation to one primarily for pecuniary profit.

Plaintiffs point to *Coleman, supra,* as supporting their argument that defendant's contract with Marion Township renders operation of the plant a proprietary function. *Coleman* considered the city of Riverview's operation of a landfill that accepted municipal waste from 17 communities and commercial waste from "numerous sources," and from which Riverview earned a substantial profit exceeding $7 million in an eight-year period. Riverview used the landfill's annual profit to fund activities unrelated to its operation, including expansion of a fire hall and the purchase and modification of a building to house city hall, as well as to help fund unrelated city operations such as the police and fire departments, the city library, the city ski hill and the department of public services. Moreover, Riverview transferred landfill revenue to its general fund, permitting its millage rate to steadily decline. *Id.* at 616-617, 622. Under these circumstances, our Supreme Court concluded that it was "clear that the primary purpose of the city of Riverview landfill was to produce a pecuniary profit" to raise funds for the city's general operation. *Id.* at 622-623. Further, the Court noted that, while the operation of a municipal landfill ordinarily might be supported by taxes or fees, so as to exclude it from the proprietary function exception, in the case before it Riverview was operating a "commercial landfill that accepts garbage, not merely from the city of Riverview, but from communities as distant as Ontario, Canada," and that "[a]n enterprise of such vast and lucrative scope is simply not normally supported by a community the size of the city of Riverview either through taxes or fees." *Id.*

As discussed above, here unlike in *Coleman*, there is no indication whatever that defendant's expanded operation of its wastewater treatment plant was primarily intended as a general revenue-raising enterprise. Defendant does not use revenue from the plant to fund other activities, nor would it be permitted to do so under its contract with Marion Township. Moreover, in contrast to the landfill at issue in *Coleman*, operation, expansion, and maintenance of defendant's wastewater treatment plant is an activity that normally is supported by taxes and fees. The fact that defendant received a financial benefit from Marion Township that was used solely to make wastewater treatment plant improvements necessary to meet the joint needs of the two municipalities does not convert the wastewater treatment operation into a "proprietary function." Thus, plaintiffs' trespass/nuisance claim is barred by governmental immunity. Consequently, the trial court erred in denying defendant's motion for summary disposition on count I of plaintiffs' complaint.

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[3] Plaintiffs also note that before expansion, the plant was declining in its fund equity on a yearly basis, but after the expansion, the fund equity increased substantially and has increased in every year since. However, defendant explained that the initial substantial increase in fund equity resulted from defendant's booking of the capital improvements to the plant as assets and notes that the plant operated at a net income loss in 2003, 2004, and 2005.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette